IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 27, 2008 Session

STATE OF TENNESSEE v. MITCHELL EADS

Direct Appeal from the Criminal Court for Claiborne County
No. 12019 E. Shayne Sexton, Judge

No. E2006-02793-CCA-R3-CD - Filed July 21, 2008

The defendant, Mitchell Eads, was convicted by a Claiborne County jury of possession of contraband in a penal institution, a Class C felony, and felony escape, a Class E felony. The trial court subsequently sentenced him as a persistent offender to fourteen years at 45% for the possession of contraband conviction and as a career offender to six years at 60% for the felony escape conviction, with the sentences to be served consecutively to each other and consecutively to the defendant's twenty-four-year sentence in a prior case, for a total effective sentence of forty-four years in the Department of Correction. The defendant raises essentially four issues on appeal: (1) whether the evidence was sufficient to sustain his convictions; (2) whether the trial court erred in allowing juror questions to be submitted to a witness and in not allowing the defendant to cross-examine the witness about his responses; (3) whether he was denied his Sixth Amendment right to trial by jury by the trial court's limiting of the jury's view of the crime scene; and (4) whether the trial court imposed an excessive sentence by erroneously applying enhancement factors, not applying an applicable mitigating factor, and ordering that his sentences run consecutively to his twenty-four-year sentence in the prior case. Following our review, we affirm the judgments of the trial court but remand for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed and Remanded for Resentencing

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Wesley D. Stone, Franklin, Tennessee, for the appellant, Mitchell Eads.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; William Paul Phillips, District Attorney General; and Jared R. Effler and Howard Ells, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

On February 25, 2002, the defendant was incarcerated on a felony charge at the Claiborne County Jail, located on the third floor of the Claiborne County Courthouse. At approximately 5:00 a.m., he forced Deputy Jailer Bryan Ferguson at knifepoint to open the doors at the front of the jail, began running down the stairwell, and was apprehended at the foot of the stairs by deputies of the Claiborne County Sheriff's Department, whose office was located on the ground floor of the building. The defendant was subsequently indicted on one count of possession of contraband in a penal facility, one count of especially aggravated kidnapping, and one count of felony escape.

At the defendant's December 9-10, 2002 trial, Nancy Elizabeth Shoffner testified that she was employed with the Claiborne County Sheriff's Department as jail administrator and nurse from September 1, 1998, through September 1, 2002. She said that the jail was located on the third floor of the courthouse and that it housed prisoners who were awaiting trial or had already been convicted and sentenced to the Department of Correction or to the jail. She stated that weapons were prohibited in the jail and that she did not give the defendant permission to have the homemade knife found in his possession on February 25, 2002, or to leave the premises of the jail.

On cross-examination, Shoffner acknowledged that the Claiborne County Jail was converted to a workhouse during her husband's tenure as Claiborne County sheriff. She said she notified the Commissioner of the Department of Correction of the defendant's escape but, because the defendant was captured at the foot of the stairs, did not notify the Commissioner of Safety, the director of the Tennessee Bureau of Investigation, the sheriffs of the surrounding counties, or the trial judges involved in his case. She identified photographs of the stairwell where the defendant was apprehended and said that the maintenance of the steps and stairwell was the responsibility of the courthouse. Finally, she acknowledged that she terminated Officer Bryan Ferguson's employment at some point after the defendant's escape, explaining that he had violated the rules against fraternizing with an inmate. On redirect examination, she testified that she determined that Officer Ferguson was properly performing his duties at the time the defendant escaped. She also explained that the jail's conversion to a workhouse did not alter the function of the facility as a place to house prisoners but simply meant that the inmates could be used to perform civic work in the community.

Officer Dennis Earl Beck of the Claiborne County Sheriff's Department testified that he was doing paperwork in the sheriff's department office on the ground floor of the courthouse at approximately 5:00 a.m. on February 25, 2002, when he heard the door to the jail close and a voice over the radio saying "Get him." He said he opened the back door to the office, saw the defendant standing on the other side of the door, grabbed him, and held him against the stairwell.

Officer Steven Hurley of the Claiborne County Sheriff's Department testified that he heard the main entrance door to the jail open and shut, footsteps hurrying down the stairs, and Officer Bryan Ferguson's yelling something over the radio. He said that he followed Officer Beck out the door of the sheriff's office, saw the defendant "rounding the stairwell heading out toward the gravel parking lot," and grabbed and held him against the stairwell. At about that time, Officer Ferguson, who was "shaking head to toe" and "pale as a ghost," came down the stairs shaking a can of mace. Officer Hurley testified that the officers recovered a "shank, . . . a metal hacksaw blade that had been

filed off to a point and . . . had something wrapped around it for a handle," that the defendant dropped when apprehended. He said that, after he and his fellow officers had handcuffed the defendant and escorted him to the holding cell, they inspected the cell where the defendant had been housed and discovered that the door appeared to have been sawed.

On cross-examination, Officer Hurley testified that both the stair treads and the large metal door at the top of the stairs were red and acknowledged that he knew of no other place in the courthouse with red paint. He further acknowledged that the defendant never made it past the door to the sheriff's office. On redirect examination, he testified that the door that led to the gravel parking lot outside the sheriff's office was not a secure door and remained unlocked.

Officer Melvin Bayless of the Claiborne County Sheriff's Department testified that on February 25, 2002, he was in the sheriff's office with Officers Dennis Beck, Chris Bishop, and Steven Hurley when he heard the big red entry door to the jail open and shut, Officer Bryan Ferguson's voice over the radio saying "Get him," and footsteps running down the stairs. He said he and his fellow officers went out the door and saw the defendant, whom they knew should not be down there, standing on the other side. He stated that Officers Beck and Hurley pinned the defendant against the steps while he went "across the rail" to assist. As he did so, he saw the defendant's weapon strike the brick wall and bounce down the steps. On cross-examination, he acknowledged that the defendant came to a stop at sight of the officers.

Officer Chris Bishop of the Cumberland Gap Police Department, formerly a sergeant with the Claiborne County Sheriff's Department, testified that he and his fellow sheriff's department officers were in the office when they heard a noise, went outside, and saw the defendant coming down the steps. He said that he yelled "weapon" as Officers Beck and Hurley grabbed the defendant because he saw that the defendant had a weapon in his left hand. The weapon was knocked to the ground, and he then picked it up and secured it as evidence. Officer Bishop identified the weapon, which he described as a hacksaw blade that had been sharpened into a point at one end and had a black trash bag braided into a handle on the other end. On cross-examination, he testified that the general public sometimes enters the courthouse through the door leading to the gravel parking lot outside the sheriff's office. He acknowledged he could not recall seeing red paint anywhere else in the courthouse other than in the workhouse and on the stairs leading to the workhouse.

Officer Missy Wright testified that she was a jailer with the Claiborne County Sheriff's Department and was working the night shift with Bryan Ferguson on February 25, 2002. She said that, at about 5:00 that morning, Ferguson went to awaken the trustees while she remained in the office. Five to ten minutes later, she heard keys at the kitchen door, glanced up, and saw him coming through the kitchen with the defendant at his side. The next thing she knew, the defendant had gone out the front door and a visibly shaken Ferguson was running into the office to get to the radio. On cross-examination, Wright acknowledged that the door that led to the gravel parking lot was generally used only by the deputies or other individuals who were there "for workhouse purposes," and that the general public usually accessed the sheriff's department either through the main or side entrances of the courthouse. On redirect examination, however, she agreed that the general public was allowed to park in the gravel parking lot and that the door that led to the gravel parking lot remained unlocked.

Bryan Ferguson testified that he was formerly employed as a correctional officer with the Claiborne County Sheriff's Department but was discharged on August 8, 2002, for fraternizing with an inmate. He said that at approximately 5:35 a.m. on February 25, 2002, he went to awaken the trustees in cell two in the maximum unit. As he was walking past cell three, the defendant, who was standing at the cell door, said, "Open the red door." He continued past but then caught a glimpse of the cell door swinging open behind him and the defendant approaching with a sharp object in his hand. He said that the defendant placed the sharp object, a homemade knife, to his chest and told him not to do anything stupid. The defendant then grabbed his right arm and pressed the knife to his side. Believing that the defendant would kill him if he did not comply with his demands, Ferguson spent the next five to ten minutes attempting to open the red door, which led to the fire escape, but none of his keys fit the lock. He testified that the defendant became agitated when the door would not open and ordered that he take him to the main entrance. The defendant then escorted him, knife pressed against his side, to the front door of the jail, telling him as they passed his partner that he better not say anything or he would regret it.

Ferguson testified that he and the defendant passed through the blue maximum security hallway door, the white bullpen hallway door, and the red wire mesh gate before finally reaching the main entrance door. The first two doors were unlocked, but he had to unlock the final two doors with his keys. When he unlocked the front door, the defendant let go of his arm and "bolted out the door." On cross-examination, Ferguson agreed that he had become acquainted with some of the inmates during his employment at the workhouse and had dated a female inmate who was serving a sentence on the weekends. He denied, however, that he fraternized with the woman while she was in the jail or ever gave anything to an inmate. He said that the stair treads leading to the jail were red for safety reasons and that he did not know whether red paint was used anywhere else in the courthouse. Finally, in response to jury questions read by the trial court, Ferguson testified that even though the jail was located in the courthouse it was considered a separate facility from the rest of the building, that the jail ended at the red entrance door, and that the courthouse was responsible for the stairs with the red paint.

The defendant elected not to testify and rested his case without presenting any proof. Following deliberations, the jury convicted him of possession of contraband in a penal institution and felony escape but acquitted him of the especially aggravated kidnapping charge of the indictment.

ANALYSIS

I. Sufficiency of the Evidence

The defendant first challenges the sufficiency of the evidence in support of his convictions. In considering this issue, we apply the rule that where sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.

Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

A. Possession of Contraband in a Penal Institution

At the time of the offense, Tennessee Code Annotated section 39-16-201, "Introduction or possession of weapons, explosives, intoxicants or drugs into a penal institution where prisoners are quartered" provided in pertinent part:

> (a) It is unlawful for any person to:
>
> (1) Knowingly and with unlawful intent take, send or otherwise cause to be taken into any penal institution where prisoners are quartered or under custodial supervision any weapons, ammunition, explosives, intoxicants, legend drugs, or any controlled substances found in chapter 17, part 4 of this title;
>
> (2) Knowingly possess any of the materials prohibited in subdivision (a)(1) while present in any penal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution.

Tenn. Code Ann. § 39-16-201(a) (1997) (amended 2006).

The defendant argues that the evidence was insufficient to sustain his conviction for possession of contraband because the State failed to present the testimony of the sheriff, who was

the chief administrator of the workhouse pursuant to Tennessee Code Annotated section 41-2-102, to establish that he did not have his express written consent to possess the weapon. He additionally argues that there was insufficient circumstantial evidence from which a jury could conclude that he lacked the express written consent of the sheriff because, unlike the prisoners in State v. Jimmy Cullop, Jr., No. 03C01-9607-CR-00281, 1997 WL 119553 (Tenn. Crim. App. Mar. 18, 1997), and State v. Jimmy Bowen, No. 03C01-9612-CR-00460, 1997 WL 789899 (Tenn. Crim. App. Dec. 23, 1997), there was no proof that he attempted to conceal the weapon. The State disagrees that there was no evidence that the defendant attempted to conceal the knife and argues that the testimony of jail administrator Elizabeth Shoffner was sufficient to establish that he lacked express written permission to possess the weapon in the jail. We agree with the State.

The defendants in Cullop and Bowen, who both were convicted of possession of marijuana in a penal institution, each challenged the sufficiency of the evidence on the basis that the State failed to present the testimony of the institutions' chief administrators to establish that the possession occurred without express written consent. Cullop, 1997 WL 119553, at *1; Bowen, 1997 WL 789899, at *3. In both cases, this court concluded that witness accounts of how the defendants attempted to conceal the marijuana were sufficient circumstantial evidence from which a reasonable jury could conclude that they lacked permission to possess the contraband. Cullop, 1997 WL 119553, at *2; Bowen, 1997 WL 789899, at *4.

The defendant attempts to distinguish his case from Cullop and Bowen on its facts by pointing out that he brandished the knife at Officer Ferguson and made no attempts to conceal the weapon when confronted by the sheriff's deputies at the foot of the stairs. We agree with the State, however, that the mere fact that the defendant openly brandished the weapon when executing his escape does not mean that he made no attempts to conceal it prior to that time. No proof was presented that the defendant, prior to the time of his escape, ever flaunted the weapon in front of correctional officers or staff. The jury reasonably could have inferred from the evidence that the defendant kept the weapon concealed on his person or in his cell, surreptitiously used it to saw through his cell door, and openly brandished it only when the right opportunity presented itself for his escape.

Moreover, the State in this case, unlike in Cullop and Bowen, presented direct testimony from the administrator of the jail that the defendant did not have permission to have the weapon in the facility. Shoffner testified that she was the jail administrator during the time of the defendant's escape, that she formulated policies and procedures for the operation of the jail, that weapons were prohibited in the jail, and that she did not give the defendant express written permission to have the knife in his possession. We conclude, therefore, that the evidence, viewed in the light most favorable to the State, was sufficient to sustain the defendant's conviction for possession of contraband in a penal institution.

B. Felony Escape

The defendant next contends that the evidence was insufficient to sustain his felony escape conviction because the State failed to show that he completed the offense. He asserts that, because he was charged with possession of contraband in the Claiborne County Jail in count one of the

indictment, but was charged with escape from the Claiborne County Workhouse in count three, the State drew a distinction between the jail, located on the third floor of the courthouse, and the workhouse which, according to the defendant, included the area of the red-painted stairwell where he was apprehended. He argues, therefore, that the most of which he can be guilty is an attempted escape from the facility. In support of this contention, he points to Shoffner's admission that she did not contact the various officials that are required to be notified pursuant to Tennessee Code Annotated section 39-16-606 whenever a person convicted of a felony escapes from a penal institution. The State argues that the evidence supports the defendant's conviction for felony escape, and we agree.

At the time of the offense, Tennessee's escape statute provided in pertinent part:

> (a) It is unlawful for any person arrested for, charged with, or convicted of an offense to escape from a penal institution, as defined in § 39-16-601.
>
> (b) A violation of this section is:
>
> (1) A Class A misdemeanor if the person was being held for a misdemeanor; and
>
> (2) A Class E felony if the person was being held for a felony.

Tenn. Code Ann. § 39-16-605(a), (b) (1997). Section 39-16-601 reads in pertinent part:

> As used in this part, unless the context otherwise requires:
>
> . . . .
>
> (2) "Custody" means under arrest by a law enforcement officer or under restraint by a public servant pursuant to an order of a court;
>
> (3) "Escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole; and
>
> (4) "Penal institution," for the purposes of this part, includes any institution or facility used to house or detain a person:
>
> (A) Convicted of a crime; or
>
> (B) Adjudicated delinquent by a juvenile court; or
>
> (C) Who is in direct or indirect custody after a lawful arrest.

Tenn. Code Ann. § 39-16-601.

Viewed in the light most favorable to the State, the evidence established that the defendant used a homemade knife to saw open his cell door. Using that same homemade weapon, he then forced Officer Ferguson to escort him to the front of the jail and unlock the entrance door, allowing him to exit from the third floor secured area into the stairwell that was accessible to the general public via an unsecured door. Ferguson testified that the jail's confines ended at the red front door, and numerous other State's witnesses testified that the stairs leading up to the third floor jail, regardless of paint color, were not part of the jail but instead were the responsibility of the courthouse. We agree with the State that whether or not Shoffner notified other authorities of the defendant's escape is irrelevant. We conclude, therefore, that the evidence was sufficient to sustain the defendant's conviction for felony escape.

II. Juror Questions

The defendant next contends that the trial court committed reversible error by asking juror questions of Officer Ferguson without a proper foundation and by not allowing him to cross-examine Ferguson on his responses. Specifically, he argues that by submitting the jurors' questions about whether the jail was considered a separate facility from the rest of the courthouse, where the jail property line ended, and who was responsible for the steps with the red paint, the trial court improperly allowed Ferguson to testify to ultimate issues of fact. The State argues, *inter alia*, that the trial court did not abuse its discretion in allowing the questions. We, again, agree with the State.

Tennessee Rule of Criminal Procedure 24.1(c), which was adopted by our supreme court by order dated January 31, 2003, and effective as of July 1, 2003, stated:

> Juror Questions of Witnesses.– In the court's discretion, a juror desiring to propound a question to a witness may be permitted to do so. The juror must put the question in written form and submit it to the judge through a court officer at the end of a witness's testimony. The judge shall review all such questions and, outside the hearing of the jury, shall consult the parties about whether the question should be propounded. The judge, in his or her discretion, may ask the juror's question in whole or part and may change the wording of the juror's question before propounding it to the witness. The judge may permit counsel to ask the question in its original or amended form in whole or part, in the judge's discretion. When juror questions are permitted, early in the trial jurors shall be instructed about the mechanics of asking a question. In addition, the jurors shall be instructed to give no meaning to the fact that the judge chose not to ask a question or altered the wording of a question submitted by a juror. A juror's question shall be anonymous, so that the juror's name is not included in the question. All jurors' questions, whether approved or disapproved by the court, shall be retained for the record.

Tenn. R. Crim. P. 24.1(c) (effective July 1, 2003) (amended 2006).

Although the rule was not in place at the time of the defendant's trial, the trial court followed essentially the same procedure in its handling of the jurors' questions. The court instructed the jury of the appropriate protocol for asking questions and followed the protocol throughout, having the

jurors submit their questions in writing to the bailiff at the end of each witness's testimony for the court to review and discuss with respective counsel. At the conclusion of Ferguson's testimony, the following colloquy occurred:

> THE COURT: Ladies and gentlemen, do you-all have a question for this witness? Okay. If you'll pass your question over to the side.
>
> Does anyone else need time to prepare a question? Any other questions?
>
> (No verbal response.)
>
> All right. Counsel for both sides join me in the . . .
>
> [PROSECUTOR]: Your Honor, [a juror] has a question.
>
> THE COURT: Pardon?
>
> BAILIFF: One moment, Your Honor.
>
> (The Court and counsel retired to chambers for a conference.)
>
> THE COURT: Mr. Ferguson, the jury has some questions they'd like to pose to you and I will ask you those questions. Please listen carefully.
>
> . . . .
>
> THE COURT: (As read)
>
> Even though the jail is in this building is it considered a separate facility?
>
> THE WITNESS: Yes.
>
> THE COURT: (Reading)
>
> Does the jail property line, responsibility, etcetera, end outside the red solid door by the office?
>
> THE WITNESS: Yes.
>
> THE COURT: (As read)
>
> Who is in charge of the steps with the red paint?
>
> THE WITNESS: The courthouse is.

Defense counsel's later comments to the trial court, made after the State had rested its case, indicates that he had objected to the questions during the in-chambers conference:

> Your Honor, I would like to place on the record that – in light of the questions asked by the jury just a moment ago, I objected to any of those questions being asked and I want to renew that. I didn't agree that those answers should've been provided through this witness or to the jury. I think those things are preserved for the province of the jury and I think they invaded the province of the jury.
>
> I don't think that the witness had any ability to know whether the courthouse was responsible for the red paint and I think that because of that he was not properly proffered on that issue.
>
> And, secondly, the inability to cross-examine them was stated by the Court and I would object to that.

We find no abuse of discretion in the trial court's allowance of these questions. Similar questions regarding the location of the jail and the responsibility for the red-painted stairwell were asked and answered by numerous other witnesses, without objection. The defendant is not entitled to relief on the basis of this issue.

III. Viewing of Jail

The defendant next contends that he was denied his Sixth Amendment right to a fair trial by the trial court's limiting of the jury's view of the crime scene. Specifically, he argues that the jury's tour should have begun at the place he was apprehended. The State argues that the defendant has waived the issue by failing to make a contemporaneous objection at trial and that there is nothing in the record to show that the jurors were prevented from viewing the stairwell during their tour. Whether to allow a jury view of a crime scene is within the discretion of the trial court, and this court will not reverse that decision absent a clear showing of an abuse of discretion. State v. Dwight Miller, No. 02C01-9708-CC-00300, 1998 WL 902592, at *8 (Tenn. Crim. App. Dec. 29, 1998) (citing Boyd v. State, 475 S.W.2d 213, 222 (Tenn. Crim. App. 1971)).

We find no abuse of discretion by the trial court in this matter. The record reveals that one or more of the jurors apparently requested in writing that the jury be allowed to view the jail. The trial court conferred with the parties, outside the presence of the jury, and defense counsel, at that time, informed the court that he had discussed the matter with his client and was fine with the proposed viewing. Shortly thereafter, defense counsel requested that the tour "start down where you come into the gray door into the workhouse down there." The trial court responded:

> Well, this is not my show, it's not you-all's show. This is the jury making a conscious question and I'm not going to start maneuvering that for either side. They want to see the jail where they consider – you know, you may have . . . 14 individual ideas about where the jail begins and they'll be led up the standard path which is, I

assume, down this hallway, up the main corridor stairs and directly in. So they'll have to observe wherever they choose to observe.

The defendant asserts that the trial court's "directing the ascent which excluded the area where the defendant was met by the sheriff's deputies at the foot of the stairs" prevented the jury from viewing the "whole crime scene" and amounted to commenting on the evidence. We respectfully disagree. As the State points out, the record is silent as to which portions of the jail the jurors viewed and there is nothing to indicate that they were not, in fact, shown the stairwell where the defendant was apprehended. When the trial resumed in the courtroom after the viewing, defense counsel rested his case without raising any objection to the manner in which the viewing had been conducted or to the portions of the jail the jury had or had not viewed. We also note that photographs of the stairwell and the gray exit door were admitted into evidence and published to the jury. We conclude, therefore, that the defendant is not entitled to relief on the basis of this issue.

IV. Sentencing

As his final issue, the defendant challenges the sentencing determinations made by the trial court, arguing that the court imposed an excessive sentence by erroneously applying enhancement and mitigating factors and ordering consecutive sentencing. When an accused challenges the length and manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). However, this court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination of these facts is predicated upon the witnesses' demeanor and appearance when testifying.

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the accused in his own behalf; and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210; State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169. In this case, the defendant has the burden of illustrating the sentence imposed by the trial court is erroneous.

At the April 8, 2003, sentencing hearing, David Honeycutt, previously employed with the Claiborne County Sheriff's Department, testified that he arrested the defendant in September 2001 for a series of crimes committed at Annie's Auto Sales and Midway School in Claiborne County and that the defendant was still being held in the Claiborne County Jail on those charges on February 25, 2002. Community Corrections Officer Wayne Lee testified that he was assigned to supervise the defendant in 1996 or 1997, but the defendant was revoked by the trial court and never successfully completed the community corrections program. Finally, Probation and Parole Officer Lee Ann Skeens testified that she was assigned to supervise the defendant as a parolee in the early summer of 2001. She said that the defendant had no reporting or employment problems but in September 2001 was arrested and eventually convicted of several felonies. On cross-examination, she testified that the sentence she originally supervised the defendant on was set to expire in 2005.

Pursuant to statute, the trial court sentenced the defendant as a career offender to the maximum sentence of six years for the Class E felony escape conviction. See Tenn. Code Ann. § 40-35-108(c) (2003). The trial court found three enhancement factors applicable to the defendant's sentence for possession of contraband in a penal institution: his previous history of criminal behavior and convictions in addition to those necessary to establish his range, his unwillingness to comply with the conditions of a previous sentence involving release into the community, and the fact that the offense was committed while he was incarcerated for a felony conviction. See id. § 40-35-114(2), (9), (15). The trial court gave the defendant "the benefit of the doubt" with respect to the State's proposed enhancement factor that the crime was committed under circumstances in which the potential for bodily injury to the victim was great, id. § 40-35-114(17), and found no mitigating factors applicable to the offense. Accordingly, the trial court sentenced the defendant to fourteen years, four years beyond the presumptive sentence of ten years for the Class C felony offense. Id. § 40-35-112(c)(3). The trial court ordered that the six-year escape sentence be served consecutively to the fourteen-year sentence for possession of contraband, for an effective sentence of twenty years. The court further ordered that the fourteen-year possession of contraband sentence run consecutively to the defendant's twenty-four-year sentence in case number 11969, for a total effective sentence of forty-four years in the Department of Correction.

A. Enhancement and Mitigating Factors

The defendant first contends that the trial court erred in its application of enhancement and mitigating factors to his possession of contraband offense. Specifically, he challenges the trial court's application of enhancement factors (9) and (15), arguing that there was no documentation to support the trial court's finding that he had a previous history of unwillingness to comply with the conditions of a sentence involving release into the community and that his sentence should not have been enhanced based on the fact that the offense occurred while he was incarcerated for a felony

because incarceration is an essential element of possession of contraband in a penal institution. He additionally argues that the trial court should have applied as a mitigating factor that his conduct neither caused nor threatened serious bodily injury, see Tenn. Code Ann. § 40-35-113(1) (2003), and that use of both enhancement factors (9) and (15), violated his Sixth Amendment rights under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), because they were based on factors that were not found by the jury.

The State argues that enhancement factor (9) was supported by the testimony of the officers who supervised the defendant while he was on community corrections and on parole; the offense of possessing contraband in a penal institution can be committed by one who is not incarcerated in the institution; mitigating factor (1) was not appropriate to the offense; any Sixth Amendment error in the trial court's application of enhancement factors not found by the jury was harmless beyond a reasonable doubt; and the defendant's extensive criminal history was sufficient alone to justify the enhanced sentence in this case.

We agree with the State that proof of the defendant's previous history of unwillingness to comply with the conditions of a sentence involving release into the community was provided through Wayne Lee, the community corrections officer who testified that the defendant was revoked from his community corrections sentence while under his supervision, and Lee Ann Skeens, the probation and parole officer who testified that the defendant was arrested for felony charges while she was supervising him on parole. Moreover, these violations are also reflected in the defendant's presentence report. As the State points out, this fact distinguishes the defendant's case from State v. Dean, 76 S.W.3d 352, 380 (Tenn. Crim. App. 2001), cited by the defendant, in which this court found application of the enhancement factor to be error because no disposition was shown for the defendant's charge of violation of parole.

We also agree with the State that a defendant's incarceration is not an essential element of the offense of possession of contraband in a penal institution, see Tenn. Code Ann. § 39-16-201, and that the mere fact that the trial court declined to apply as an enhancement factor that the crime was committed under circumstances in which the potential for bodily injury was great, see Tenn. Code Ann. § 40-35-114(17), does not mean that it erred by not finding that the defendant's crime neither caused nor threatened serious bodily injury. The defendant's act of pressing a homemade knife to Ferguson's chest and side certainly threatened serious bodily injury.

We agree with the defendant, however, that under Blakely, the trial court's application of enhancement factors (9) and (15) violated his Sixth Amendment right to trial by jury. Nonetheless, we conclude that the defendant's extensive history of prior convictions, which included at least thirty prior felony convictions committed over the course of a few years, more than justifies the enhanced sentence. Accordingly, we affirm the fourteen-year sentence imposed by the trial court.

B. Consecutive Sentencing

The defendant next contends that the trial court erred by ordering that his six-year escape sentence and his fourteen-year possession of contraband sentence be served consecutively to each

other and to his twenty-four-year sentence in case number 11969. The defendant asserts that he was being held without bond on his parole violation, and not on the felony charges for which he had been arrested, at the time of his escape. In support, he cites a comment made by the trial court at sentencing that there was "no question" that the defendant was in custody on a parole violation at the time of his escape. He argues, therefore, that the trial court should have ordered the escape sentence to be served consecutively to the two years that were remaining on his previous sentences. He additionally argues that the trial court abused its discretion in ordering that the fourteen-year contraband sentence be served consecutively to the twenty-four-year sentence in case number 11969 instead of consecutively to the six-year escape sentence.

At the sentencing hearing, the assistant district attorney argued that the defendant's six-year escape sentence, by statute, had to be served consecutively to the twenty-four-year sentence he received for the offenses for which he was being held at the time of his escape and requested that the trial court exercise its discretion by ordering that the defendant's fourteen-year contraband sentence be served consecutively to that same twenty-four-year sentence based on the defendant's extensive criminal history. In making its ruling, the trial court stated:

> Now, the first thing that I'm going to do is I'm going to find that this sentence runs consecutive to – when I say this sentence, I'm talking about the escape will run consecutive to the possession of contraband charge for which he was convicted at the same – at the same trial.
>
> And the reason that I say that the . . . legislature has limited this Court's ability is that that six years is mandatory and the 60% is mandatory, and the consecutive order is mandatory.
>
> Then we go on now to the areas in which I have certain discretion. I see those areas as the length of sentence that the defendant faces on the contraband charge, the Class C felony, and also the question of whether or not this new sentence will run consecutive or concurrent to the sentence that he was sentenced on back in December. . . .
>
> . . . .
>
> One of these sentences – [The defendant] was serving a sentence that will expire in 2005. There's no question, he was in custody at that time on a parole violation on that sentence.

The trial court also ordered that the contraband sentence be served consecutively to the defendant's sentences in case number 11969, apparently based on a finding that the defendant qualified as an offender whose record of criminal activity was extensive. See Tenn. Code Ann. § 40-35-115(b)(2).

The escape statute provides in pertinent part that "[a]ny sentence received for a violation of this section shall be ordered to be served consecutively *to the sentence being served or sentence received for the charge for which the person was being held at the time of the escape*." Tenn. Code

Ann. § 39-16-605(c) (emphasis added). Similarly, Tennessee Rule of Criminal Procedure 32 provides that when a defendant has multiple sentences and "the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply . . . to a sentence for escape or for a felony committed while on escape." Tenn. R. Crim. P. 32(c)(3)(B). Because the trial court erred in its determination that it was required to order the escape and contraband sentences to be served consecutively pursuant to the escape statute and because its sentencing determinations with respect to the discretionary order of consecutive sentencing is somewhat unclear, we remand this case to the trial court for resentencing. Upon remand, the trial court shall determine which sentence or sentences the defendant was serving at the time of his escape and order the escape sentence to be served consecutively to those sentences. The trial court shall also clearly place on the record its rationale for ordering the other sentences to be served either concurrently or consecutively.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court but remand for appropriate resentencing in accordance with this opinion.

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ALAN E. GLENN, JUDGE